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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

THE CONSOLIDATED CITY
OF JACKSONVILLE,
DUVAL COUNTY, FLORIDA,
a municipal corporation,

Petitioner,

vs.

WINSTON NASH,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit in **Nash v. Consolidated City of Jacksonville,** 905 F.2d 355 (11th Cir. 1990) disregarded the Supreme Court mandate to consider the instant case in light of **Wards Cove Packing Company, Inc. v. Antonio,** 490 U.S. 642 (1989), leaving **Nash v. Consolidated City of Jacksonville,** 837 F.2d 1534 (11th Cir. 1988) and **Nash v. Consolidated City of Jacksonville,** 905 F.2d 355 (11th Cir. 1990) as published contradictions to **Wards Cove?**

2. Whether the Eleventh Circuit erroneously restricted the type of evidence it considered legally sufficient to articulate a business justification in conflict with **Washington v. Davis,** 426 U.S. 229 (1976), **Watson v. Fort Worth Bank and Trust,** 487 U.S. 977 (1988) and

Wards Cove Packing Company, Inc. v. Antonio, 490 U.S. 642 (1989)?

3. Whether the Eleventh Circuit violated the "law of the case" doctrine by ignoring and contradicting the holdings of **Nash v. Consolidated City of Jacksonville**, 763 F.2d 1393 (11th Cir. 1985)?

4. Whether the Eleventh Circuit violated stare decisis and the principle of interpanel accord by disregarding a prior panel determination in **Nash v. Consolidated City of Jacksonville**, 763 F.2d 1393 (11th Cir. 1985) that the City's evidence was legally sufficient?

5. Whether the Eleventh Circuit erred by directing a verdict against the City in conflict with **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986)?

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The opinion of the Eleventh Circuit after remand from the United States Supreme Court is reported at **Nash v. Consol. City of Jacksonville, Duval County**, 905 F.2d 355 (11th Cir. 1990) (hereinafter referred to as **"Nash III")(Appendix-87)**;* the opinion of the Supreme Court is reported at **Consolidated City of Jacksonville, Duval County, v. Nash**, 104 L.Ed.2d 1015 (1989)(hereinafter referred to as **"Nash SC")**(A-85); two separate earlier opinions of the Eleventh Circuit are reported at **Nash v. Consol. City of Jacksonville, Duval County**, 763 F.2d 1393 (11th Cir. 1985) (hereinafter referred to as **"Nash I")**(A-28) and **Nash v. Consol. City of Jacksonville, Duval**

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* Hereinafter the Appendix is referred to as (A-__).

County, 837 F.2d 1534 (11th Cir. 1988)(hereinafter referred to as **"Nash II"**)(A-65).

The opinion and orders of the district court, dated June 4, 1984 (A-4) and May 4, 1987 (A-44) have not been officially reported. The Eleventh Circuit order denying rehearing and suggestion of rehearing en banc is not yet reported. (A-98).

JURISDICTION

i) The judgment of the Eleventh Circuit was entered July 9, 1990.

ii) The order denying rehearing and suggestion of rehearing en banc was entered September 28, 1990.

iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 10.1 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

42 U.S.C., Section 2000, et seq.

29 C.F.R., Part 1607, et seq.

STATEMENT OF CASE

This is the second time the petitioner seeks review of this cause in the United States Supreme Court.

The Supreme Court granted certiorari in **Nash SC**, immediately following the decision of **Wards Cove Packing Company, Inc. v. Atonio**, 490 U.S. 642, 104 L.Ed.2d 733 (1989), and vacated the **Nash II** decision for reconsideration in light of **Wards Cove.** The issues before the Court in **Nash SC** were the **Wards Cove** issues of the proper burden of persuasion in an employment disparate impact case, and the definition and application of the terms "job related" and "business necessity".

Upon remand in **Nash III**, the Eleventh Circuit failed to consider these **Wards Cove** issues. The **Nash III** decision reinstated **Nash II** merely focusing on the

plaintiff's initial prima facie case in disparate impact analysis.[1]

The facts leading to the **Nash III** decision are as follows: In 1981, Winston Nash (Nash), a black male, failed a promotional examination to be a firefighter lieutenant with the City of Jacksonville (City). The examination had a disparate impact upon blacks.

On March 14, 1983, Nash filed his complaint under Title VII of the Civil Rights Act of 1964, as amended, alleging race discrimination in promotions under a disparate impact theory of recovery. At trial, the City established that: (1) the test questions were prepared according to EEOC guidelines relating to content validity and (2) the test questions

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1. The Plaintiff's initial burden is whether disparate impact even occurred. At all times, the City conceded that there was disparate impact. This was never an issue in this case. See **Nash** III at 357. (A-91-92).

related to functions actually performed on the job. (A-118-125). Nash admitted at trial that the test questions were job related.[2] (A-112-117). The examination was not introduced into evidence.[3]

The United States District Court for the Middle District of Florida (trial court) entered judgment for the City. Nash appealed to the Court of Appeals for the Eleventh Circuit.

On June 25, 1985, the Eleventh Circuit in **Nash** I reversed the trial court's decision stating that the court applied the law controlling in disparate treatment cases rather than disparate impact law. The Eleventh Circuit

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2. The trial evidence became law of the case in **Nash** I at 1395. (A-33, 34).

3. A protective order denying Nash production of the examination was granted after he failed to file timely opposition to the City's motion. (A-100-104).

concluded that the trial court placed only a burden of articulation on the City.[4] Significantly, the Eleventh Circuit specifically determined that the City more than sufficiently met this burden of production, when it ruled:

> It is true that defendant, in its testimony, went much beyond mere "articulation," and the court recited this testimony with every indication of believing it, yet the court at 180-181 repeatedly states that plaintiff has failed to persuade the court "by a preponderance of the evidence." The idea seems to be that mere "articulation" shifts the burden back to plaintiff to persuade that the test is discriminatory, but this is contrary to the authorities in this circuit as to "impact" employment test

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4. The trial court's analysis was ultimately vindicated by **Wards Cove**.

cases that we have decided. (Emphasis added).[5]

Nash I at 1397-1398. (A-39).

Neither party sought a trial de novo after remand. No additional evidence was taken. Nash and the City filed proposed findings of fact and conclusions of law. (A-105-111). The trial court again entered judgment for the City and Nash again appealed to the Eleventh Circuit.

On February 25, 1988, the Eleventh Circuit in **Nash** II reversed on the ground that the trial court again misapplied the law and remanded with instructions to the trial court to promote Nash. The Eleventh Circuit further stated that the City failed to meet a burden of

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5. This was a favorable finding of the majority. It can be reasonably inferred from Judge Fay's specially concurring opinion that he believed that the trial court's factual and legal conclusions were correct. **Nash** I at 1399. (A-43).

production. The City's petition for rehearing and suggestion of rehearing en banc to the Eleventh Circuit was denied on March 29, 1988.

The City then petitioned the Supreme Court for a writ of certiorari on the grounds that, inter alia, the Eleventh Circuit rendered a decision which required an improper standard of proof for a disparate impact case; the Eleventh Circuit's reevaluation of the evidence was patently violative of the Supreme Court's clearly erroneous standard; and the Eleventh Circuit misapplied the job-relatedness standard.

Certiorari was granted for reconsideration in light of **Wards Cove** and the **Nash II** decision was vacated. **Nash SC.** In **Nash III**, the Eleventh Circuit failed to consider the **Wards Cove**

issues upon which remand was granted, and again reversed the trial court reinstating **Nash** II. Rehearing and rehearing en banc in the Eleventh Circuit were again denied.

REASONS FOR GRANTING CERTIORARI

I

THE ELEVENTH CIRCUIT DISREGARDED THE SUPREME COURT MANDATE, AND *NASH II* AND *III* NOW STAND AS PUBLISHED CONTRADICTIONS TO *WARDS COVE.*

The Supreme Court's mandate to the Eleventh Circuit was to reconsider **Nash** II in light of the pronouncements in **Wards Cove Packing Company, Inc. v. Atonio**, 490 U.S. 642, 104 L.Ed.2d 733, (1989). In **Wards Cove**, the Court held that the employer's obligation upon a demonstration of disparate impact is to produce evidence that a challenged practice serves, in a significant way, the legitimate goals of the employer.[6] The Court further clarified the

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6. "...[A]t the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate goals of the employer..." **Wards Cove**, 104 L.Ed.2d at 752.

appropriate allocation of proof in a disparate impact case.[7] These principles required a complete overruling of **Nash** II by the Eleventh Circuit, since **Nash** II placed upon the City the burden of proving that the promotional test at issue fit within the "very narrow" definition of business necessity. (Emphasis added). **Nash** II at 1539. (A-80).

The City's petition for writ of certiorari in **Nash** SC raised only the above **Wards Cove** issues. The Eleventh Circuit in **Nash** III, however, disregarded this Court's mandate and limited its analysis to the statistical prima facie case of Nash, which was never contested.

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7. "In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff..."
Wards Cove, 104 L.Ed.2d at 753.

The Eleventh Circuit in **Nash III** acknowledged the Court's **Wards Cove** holding regarding the quantification of the employer's burden, even referring to it as a "relaxation" of past Eleventh Circuit standards.[8] Nevertheless, the Eleventh Circuit failed to discuss or otherwise analyze whether the City, in demonstrating EEOC approved content validity, met its burden of production under the "relaxed" **Wards Cove** standard. Rather, the **Nash III** panel conclusorily revived its **Nash II** holding that the City had failed to meet its burden of production[9] and ignored the **Nash I** holding

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8. "...[W]e note that the Supreme Court also relaxed an employer's evidentiary burden by only requiring that the employer produce evidence of a legitimate business justification for an employment practice." (Emphasis added). **Nash III** at 358. (A-96).

9. "This holding [**Wards Cove**] does not affect our conclusion because Jacksonville failed to meet its burden of producing evidence that the exam was job related..." **Nash III** at 358. (A-96).

that the City exceeded this burden.[10]

Nash II held that the burden of proving job-relatedness shifted to the employer upon a showing of disparate impact and that the City failed to articulate sufficient justification to raise a factual issue of job-relatedness. That decision was vacated by the Supreme Court on certiorari. **Nash SC.** The Eleventh Circuit on remand in **Nash III** reinstated the **Nash II** decision and declared that **Wards Cove** "does not directly affect this case." **Nash III** at 356. (A-89). To the contrary, **Wards**

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10. This **Nash** II/III finding is diametrically opposed to **Nash** I's finding that, "[i]t is true that defendant, in its testimony, went much beyond mere 'articulation,'..." **Nash** I at 1397. (A-39). It is significant that **Nash** I was decided on a stricter standard than **Wards Cove** requires. This point is discussed in further detail at Point III, infra.

Cove controls this case and requires its reversal.[11]

Despite this Court's mandate, the Eleventh Circuit in **Nash III** erred by not applying **Wards Cove** to the facts found in the trial court's order. In fact, the **Nash III** panel never made an independent legal finding that the trial court's findings were insufficient to move the case to the next stage of disparate impact analysis, that is, Nash's ultimate burden to prove discrimination.[12] It

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11. The Eleventh Circuit in **Nash** I stated that the question of whether the burden of persuasion or merely a burden of production shifts to the employer may be a "momentous one" determining the outcome of the case. **Nash** I at 1397. (A-39). Remarkably, the **Nash** III panel concluded that the **Wards Cove** clarification of the appropriate allocation of proof did not warrant a further analysis of the City's evidence.

12. On the otherhand, **Nash** I exhaustively set forth the City's prima facie case. **Nash** I at 1395. (A-33, 34).

merely reinstated **Nash II.**[13]

The Eleventh Circuit found that the only use for **Wards Cove** was in analyzing the plaintiff's case. The Eleventh Circuit completely failed to recognize or discuss the effect of **Wards Cove** on the employer's burden of production.[14]

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13. The Eleventh Circuit has demonstrated a reluctance to adopt the more enlightened view. Following **Watson v. Fort Worth Bank and Trust**, 488 U.S. 977 (1988), the court stated:

> ...Pending final resolution of this issue, however, this Circuit must adhere to the settled authority "stating flatly that the employer bears the burden of proving that a practice is job-related."

Stephen v. PGA Sheraton Resort, LTD., 873 F.2d 276, 279-280 (11th Cir. 1989) citing **Powers v. Alabama Department of Education**, 854 F.2d 1285, 1292 n. 11 (11th Cir. 1988).

14. Approximately one hundred (100) published lines were utilized to analyze **Wards Cove** principles never at issue. (A-93-96). In contrast, one sentence was utilized to conclusorily state that the **Wards Cove** principles at issue did not apply. **Nash III** at 357, 358. (A-96).

The **Nash** III "CONCLUSION" demonstrates that the Eleventh Circuit failed to honor the mandate:

> III CONCLUSION
>
> Following the Supreme Court's directions, we have reconsidered **Nash** II in light of **Wards Cove** and find that the teachings of **Wards Cove** do not impact upon the type of evidence Nash presented. Accordingly, we reinstate **Nash** II... (Emphasis added).

Nash III at 358. (A-97). The court only analyzed Nash's prima facie burden. The conclusion illustrates the obvious, that is, the City's evidence was not analyzed in view of **Wards Cove.**

The reinstatement of **Nash** II repudiated **Wards Cove** because **Nash** II placed a burden of proving, as opposed to a burden of articulation, on the City and required a more rigid standard of job-relatedness. Restoring **Nash** II is tantamount to a published adoption of the

Wards Cove dissent.[15] It raises the question of what purpose was served by this Court's grant of certiorari in **Nash SC.**

Nash III, together with its reinstatement of **Nash II**, should be reversed.

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15. See the dissent in **Wards Cove** where **Nash** I's improper evidentiary burdens were cited with approval. **Wards Cove**, 104 L.Ed. 2d at 759 n.14.

II

THE ELEVENTH CIRCUIT ERRONEOUSLY RESTRICTED THE TYPE OF EVIDENCE IT CONSIDERED LEGALLY SUFFICIENT TO ARTICULATE A BUSINESS JUSTIFICATION DEFENSE IN CONFLICT WITH *WASHINGTON*, *WATSON* AND *WARDS COVE*.

The Eleventh Circuit limited the evidence an employer may produce to satisfy its burden in a Title VII case in contravention of substantial Supreme Court precedent.

Nash III did not consider the employer's burden of justification as mandated by the Supreme Court remand. Rather, it reinstated **Nash** II which concluded that the evidence introduced at trial, including the exam formation methodology and Nash's admissions of job-relatedness, was legally insufficient to support a mere prima facie showing of job-relatedness.

The Eleventh Circuit in **Nash II/III** established its own narrow standard governing a prima facie defense:

> Just because test questions are drafted by qualified city employees does not mean that the questions are job-related. Even qualified supervisory personnel can construct test questions very unrelated to job performance. The fact that the City presented evidence relating to how the test was constructed is not legally sufficient by itself to show [prima facie] the questions were job-related. (Emphasis added).

Nash II at 1537. (A-75).

> Job-relatedness can be established through the testimony of expert witnesses supported by a validation study. In this case, however, there was no validation study conducted by an expert. Without the test itself and with no testimony presented by the defendant regarding job-relatedness of the questions, there was no way for the district court to conclude that the questions were job related. (Citations omitted). (Emphasis added).

Nash II at 1538. (A-76-77).

> In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden. (Emphasis added).

Nash II at 1538 n.6. (A-77).

This extremely limiting holding violated Supreme Court precedent which has consistently refused to require a specific method of rebutting adverse impact. **Nash II** in effect held that only outside expert testimony will be sufficient to defend a disparate impact prima facie case.

In **Washington v. Davis**, 426 U.S. 229, (1976), the Supreme Court declared, "[i]t appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." Id. at 247 n.13.

In **Teamsters v United States**, 431 U.S. 324 (1977), the Supreme Court illustrated specific examples of evidence used in defeating a discriminatory pattern or practice case and also stated that the examples were not exhaustive:

> The employer's defense must, of course, be designed to meet the prima facie case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use...In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. (Emphasis added).

Id. at 360 n.46

Moreover, in **Watson v. Fort Worth Bank and Trust**, 487 U.S. 977 (1988), the plurality reviewed the type of evidence legally sufficient to support a finding of an examination's job-relatedness and

reiterated the broad evidentiary alternatives available to the employer:

> Our cases make it clear that employers are not required, even when defending standardized or objective tests, to introduce formal "validation studies" showing that particular criteria predict actual on-the-job performance.

Id. at 998. The restrictive approach taken by the Eleventh Circuit in **Nash** II/III contrasts with the **Watson** plurality view.[16]

The Eleventh Circuit in **Nash** II concluded that the City failed to satisfy its burden by not offering testimony of a qualified expert to explain the job-relatedness of the questions. This contradicts the above precedent. The findings of the trial court indicated

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16. **Watson** is the predecessor to **Wards Cove** relied upon extensively therein.

that City employees testified, as qualified experts in their fields, to the job-relatedness of the test.[17] (A-118-125). Moreover, Nash conceded the job-

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17. In **Nash** III, the Eleventh Circuit again raised the issue that the City never introduced the examination into evidence. **Nash** III at 357. (A-92). This fact has been unnecessarily problematic to the court. In **Nash** II, the court repeated its **Nash** I concerns by suggesting that if the trial court had shifted the burden of persuasion to the City, "...we think defendant might have felt it incumbent to produce the examination questions." (Emphasis added). **Nash** II at 1536. (A-72).

However, there is no legal requirement for an employer to enter its examination into evidence particularly in light of the **Wards Cove** standards clearly placing the burden of proof on the employee.

Moreover, Nash admitted that the examination questions were related to the functions performed by combat firefighters. (A-112-117). Therefore, upon remand, the City found it unnecessary to use the exhibit.

In **Nash** I, Nash was only denied disclosure of the exhibit after he failed to properly respond to a motion for a protective order late in the discovery process. (A-100-104). Given an opportunity to bring the examination into evidence at a de novo trial after **Nash** I, Nash declined. (A-105).

relatedness of the questions. (A-112-117). By rejecting the relevant evidence offered by the City,[18] the Eleventh Circuit is interfering with an employer's ability to present a substantive prima facie defense to a discrimination suit by limiting the type of evidence an employer may use.

It is significant that in **Wards Cove** the Supreme Court stated:

> ...[T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. (Emphasis added).

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18. This evidence was cogently recited and accepted with approval in **Nash** I at 1395, 1396. (A-33-35). Note also that **Nash** I stated, "[t]he method of test preparation was also indirect evidence of job-relatedness." **Id.** at 1396. (A-35).

Wards Cove, 104 L.Ed.2d at 753. The Supreme Court's admonitions regarding the evils of an overly restrictive disparate impact analysis have come to fruition in this case. The Eleventh Circuit, by reinstating **Nash II**, eliminated in-house content validity and mandated the use of outside experts to justify tests that result in disparate impact. As demonstrated above, this is in direct conflict with the directions of **Washington v. Davis**, **Watson v. Fort Worth Bank and Trust**, and **Wards Cove**.

The decision below should be reversed and the case remanded for entry of the trial court's judgment.

III

THE ELEVENTH CIRCUIT VIOLATED THE "LAW OF THE CASE" DOCTRINE BY IGNORING AND CONTRADICTING THE HOLDINGS OF *NASH I*.

The instant case presents the Court with the opportunity to fully consider the implications of **Nash** III's failure to apply the "law of the case" established in **Nash** I. Future litigants and courts[19] would benefit by the Court's fresh articulation of the criteria required for proper

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19. One legal commentator claims that a conflict among the circuit courts of appeal exists in the varying degrees of stringency in which "the law of the case" doctrine applies. Joan Steinman, **Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation**, 135 U. Pa. L.Rev. 595, 613 (March 1987). She further states that "no monolithic nationwide doctrine prevails" and that the Supreme Court has not explored the doctrine at length or in a decision having broad precedential value. **Id.** The case at bar presents the Court a framework within which to analyze the doctrine in detail and provide uniform guidance to the lower courts.

rejection of, or adherence to, "law of the case" principles.

The Eleventh Circuit in **Nash III** failed to reconcile its own contradictory legal and evidentiary conclusions regarding the sufficiency of the City's evidence of articulation.[20] In **Nash I**, the Eleventh Circuit ruled that the City exceeded its burden of production under a "business necessity" standard in a disparate impact context:

> It is true that defendant, in its testimony, went much beyond mere "articulation," ...

Nash I at 1398. (A-39).

The Eleventh Circuit's stringent "business necessity" requirement was

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20. The "law of the case" doctrine is frequently applied to rulings on the sufficiency of evidence. See 5 Am.Jur. 2d, **Appeal And Error**, Section 759. **United States v. Burns**, 662 F.2d 1378, 1384 (11th Cir. 1981).

thereafter overruled by the Supreme Court's clarification of the appropriate evidentiary burdens in **Wards Cove**. **Nash** III expressly noted that the **Wards Cove** holding was a "relaxation" of the stricter Eleventh Circuit standards it imposed in **Nash** I and **Nash** II. Nevertheless, after examining the exact **Nash** I record, the **Nash** III panel stated that the same City evidence was legally insufficient under the "relaxed" burden of articulation:

> ...Jacksonville failed to meet its burden of producing evidence that the exam was job related and served the asserted business justification of promoting the most qualified firefighters...

Nash III at 358. (A-96).

In addition, **Nash** I held:

> The method of test preparation was also indirect evidence of job-relatedness.

Nash I at 1396. (A-35).[21] The above "law of the case" on the issue of the quality of the City's evidence was directly contradicted by **Nash** II and **Nash** III:

> The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job related.

Nash II at 1537. (A-75).

The Eleventh Circuit did not even discuss the classic prerequisites for its rejection of the "law of the case." This important doctrine was simply ignored, even though the Eleventh Circuit has a long history of adherence

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21. It is significant that after the **Nash** I decision, the trial court on remand was bound by the "law of the case" on this issue.

to "law of the case" principles. **Litman v. Massachusetts Mut. Life Ins. Co.**, 825 F.2d 1506 (11th Cir. 1987); **Baumer v. United States**, 685 F.2d 1318 (11th Cir. 1982); **United States v. Burns, supra**, 662 F.2d 1378.

The "law of the case" doctrine bears a close resemblance to the concept of stare decisis. It invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent stages in the same case. **United States v. Burns, supra,** at 1384. Stare decisis makes each judgment a statement of precedent binding in future cases. See 1B **J. Moore Federal Practice,** ¶ 0.401 et. seq. (2d ed. 1988). The "law of the case" principle has been regarded as a rule of practice. **United States v. United**

States Smelting R. & M. Co., 339 U.S. 186, 199 (1950).[22]

Under the doctrine, a decision on a legal issue by an appellate court should be followed on a later appeal in the appellate court unless: (1) substantially different evidence is produced at a subsequent trial; (2) controlling authority compels a contrary decision of law applicable to the issue; or (3) the prior decision was clearly erroneous and would work a manifest injustice. **Baumer v. United States, supra,** at 1320.

The fact that the Eleventh Circuit did not acknowledge the "law of the case" implications of **Nash** I is

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22. While the Court in **United States v. United States Smelting R. & M. Co., supra,** stated that "law of the case" is discretionary, this case presents the Court with an opportunity to define the limits of that discretion and to establish a clear standard.

extraordinary in the face of overwhelming factors favoring its application in the present case.

First, the trial court and all panels of the Eleventh Circuit examined the identical record. After **Nash** I, neither party sought a trial de novo on remand. (A-105-111). No new evidence was ever taken. Yet, the published Eleventh Circuit opinions stand in open conflict to each other and are legally irreconcilable.

Secondly, the vacating of **Nash** II by the Supreme Court in **Nash** SC, presumably for the Eleventh Circuit to consider the "relaxed" standard of evaluating the employer's evidence, did not compel a corresponding reversal of the **Nash** I ruling on the legal sufficiency of the City's evidence or the type of indirect evidence which may

be utilized to demonstrate job-relatedness. To the contrary, due deference to the prior panel finding after reviewing the exact evidence was required.

If the City exceeded its production threshold under the stringent "business necessity" standard in **Nash** I, a fortiori, the identical record should have supported the "relaxed" legitimate business justification defense after **Wards Cove**. To conclude otherwise is an abuse of discretion.[23]

An appellate court's departure from the doctrine raises greater

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23. The Eleventh Circuit in **Nash** I observed that the question of the appropriate evidentiary burdens may be a "momentous one" determining the outcome of the case. **Nash** I at 1397. (A-39). After **Wards Cove**, an analysis of this "momentous" legal issue compels affirmance of the first trial court decision because in retrospect the correct burden of persuasion was originally applied.

concerns than when a trial court rejects its own decision. Respect for precedent established by findings of courts of appeal is at the foundation of our legal process. Disregard of doctrines demanding respect for precedent undermine the public's trust. As the Eleventh Circuit once explained:

> Institutional tools perpetuate the value of stability and predictability -- essential factors in the proper operation of the judiciary. Predictability is essential not only to lawyers who must advise their clients about the law, but also to the notion of judicial review in creating a stable body of law. It is generally thought that appellate courts are in a better position than trial courts to accommodate the need for stability. Reviewing courts are better able to maintain the necessary continuity of doctrine over time. (Citations omitted).

Litman v. Massachusetts Mut. Life Ins. Co., supra, at 1510.

In **Nash III**, the Eleventh Circuit departed from fundamental "law of the case" principles without even addressing its open deviation from this precedential precept. The decision in **Nash III** should be vacated or reversed and the case remanded for entry of judgment consistent with **Wards Cove** and the **Nash I** ruling upholding the legal sufficiency of the City's evidence.

IV

THE ELEVENTH CIRCUIT VIOLATED *STARE DECISIS* AND THE PRINCIPLE OF INTERPANEL ACCORD BY DISREGARDING *NASH I's* PRIOR PANEL DETERMINATION THAT THE CITY'S EVIDENCE WAS LEGALLY SUFFICIENT.

The granting of certiorari herein would permit a determination by the Court of the significance of stare decisis and the principle of interpanel accord by appellate courts, and provide a standard to be applied nationally.

Interpanel accord implies an obligation[24] to address and reconcile

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24. Interpanel accord was effectively described by the Federal Circuit in **Johnston v. IVAC Corp.**, 885 F.2d 1574, 1579 (Fed.Cir.1989) as follows:

> Where conflicting statements...appear in our precedent, the panel is obligated to review the cases and reconcile or explain the statements, if possible. If not reconcilable and if not merely conflicting dicta, the panel is obligated to follow the earlier case law which is binding precedent. (Emphasis added).

prior panel decisions, which the Eleventh Circuit failed to do.

In **Nash** I, an Eleventh Circuit panel ruled that the City's evidence was a legally sufficient articulation to meet a disparate impact case:

> It is true that defendant, in its testimony, went much beyond mere "articulation,"...

Nash I at 1397. (A-39). Thereafter, the subsequent **Nash** III panel concluded that the identical City evidence was legally insufficient to support the City's burden of articulation. **Nash** III at 358. (A-96). In addition, **Nash** I held that proof of how an examination was prepared was indirect evidence of job-relatedness. **Nash** I at 1396. (A-35). **Nash** II/III held, without en banc consideration, that it was not.

Only a court of appeal sitting en banc or the Supreme Court should have the

authority to reexamine issues decided on a former appeal. See 32 Am.Jur.2d, **Federal Practice and Procedure**, Section 463, and 1B **J.Moore, Federal Practice** ¶ 0.402[1], **Bonner v. City of Prichard**, 661 F.2d 1206 (11th Cir. 1981).

In **Bonner**, the Eleventh Circuit adopted the Fifth Circuit rule that only a court en banc may overrule a predecessor panel. **Id.** at 1209. In acknowledging its strict obedience to this holding, the Eleventh Circuit recognized that no consistent principle of interpanel accord exists among the circuits:

> The various circuits differ somewhat in the extent to which they treat their own decisions as binding on themselves. Some appear at times to treat their own decisions as merely persuasive; others by rule or practice permit one panel to overrule another after prior notice to all judges of what is proposed, followed by no

> objection. The old Fifth followed the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc.

Id. at 1209. **Bonner** relied upon the reasoning in **Moragne v. States Marine Lines, Inc.**, 398 U.S. 375, 403 (1970), citing stability and predictability as essential factors governing the rule of law and in maintaining public confidence.[25]

An appellate court panel's failure to observe precedential precepts by overruling an earlier panel promotes uncertainty and multiple appeals by encouraging future "panel shopping." See **Lehrman v. Gulf Oil Corporation**, 500 F.2d 659, 662 (5th Cir. 1974).

The old Fifth Circuit standard requiring en banc consideration was

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25. **Bonner** also determined that the consideration of precedent was substantive, not procedural. **Bonner, supra**, at 1210, 1211.

disregarded in **Nash** III but should be recognized, by this Court, as part of the substantive law of stare decisis. The earlier **Nash** I decision concerning the legal sufficiency of the City's evidence should control as a matter of law, and **Nash** III should be reversed.

V

THE ELEVENTH CIRCUIT ERRED BY DIRECTING A VERDICT AGAINST THE CITY IN CONFLICT WITH *ANDERSON V. LIBERTY LOBBY, INC.*

The Eleventh Circuit in **Nash** III ruled that the City's evidence relative to its examination process did not rise to the level of a prima facie articulation of job-relatedness. By reinstating **Nash** II, the Eleventh Circuit effectively directed a verdict against the City:

> The district court also committed reversible error by allowing the City's evidence of how the test was prepared to satisfy its burden of proving that the content of the test was related to job performance. Just because test questions are drafted by qualified city employees does not mean that the questions are job-related.

Nash II at 1537. (A-75).

Since under **Wards Cove** the City has only a burden of production, and not proof, the holding of the Eleventh Circuit was, in effect, a post trial ordering of a directed verdict against the City. This was done despite the absence of any record reference to a request by Nash for a directed verdict on that issue.[26]

The standard for the consideration of a directed verdict was set forth in **Anderson v. Liberty Lobby, Inc.** 477 U.S. 242, (1986):

> ...[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

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26. It is a general rule that an appellate court does not consider an issue not passed upon by the trial court. **Singleton v. Wulff**, 428 U.S. 106, 121 (1976).

Significantly, the City was never afforded the opportunity to argue or brief the legal sufficiency issue to the Eleventh Circuit prior to either **Nash** II or **Nash** III.

> If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. (Citations omitted).

Id. at 250-251.

Not only does the City urge that it met its prima facie burden, but the **Nash** I court agreed and held: "It is true that defendant, in its testimony, went much beyond mere 'articulation,'..." **Nash** I at 1397. (A-39). The exact evidence also supported the trial court's extensive and well-articulated conclusions on remand after **Nash I**:

> After carefully considering the evidence, this Court must determine whether the 1981 examination administered for fire lieutenant (combat) was job-related. First, Defendant engaged in a lengthy, meticulous method of constructing the exam. <u>The job functions required of a fire lieutenant (combat) were developed by individuals who not only had served in the position of fire lieutenant</u> (combat) in the past, but also were now responsible for seeing

> that those who were, at present, fire lieutenant (combat) performed their jobs effectively. The make-up committee was composed of individuals intimately familiar with the work behaviors and knowledges necessary for the position of fire lieutenant (combat). Additionally, the questions were drawn to test those functions, or knowledges, from materials used to train fire lieutenants (combat).
>
> ***
>
> The test was developed by experts in the field from available materials directly related to job performance and to the knowledge required. Neither its administration, nor action taken upon the results, was designed, intended, or used to discriminate on the basis of race. (Emphasis added).[27]

(A-59-61).

The trial court compared the process by which the City created its combat fire lieutenant's exam to the process described by the EEOC and found that the

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27. At this stage, the **Nash** I "law of the case" was that the City sufficiently presented its articulation defense. Accordingly, it would have been erroneous for the trial court, on remand, to rule otherwise.

City followed the process and created a job-related examination. Nash confirmed that the actual questions were job-related. (A-112-117).

The conclusion that the Eleventh Circuit reweighed the evidence instead of testing its legal sufficiency is inescapable when the Eleventh Circuit's own language is considered:

> The best evidence on job-relatedness of the questions came from the testimony of appellant's expert, who testified that from his statistical analysis of the test results and his study of the materials he received from the City, the test was "not capable of being validated, because there's too many items that cannot be validated..." (Emphasis added).

Nash II at 1538. (A-77).

> Just because test questions are drafted by qualified city employees does not mean that questions are job-related. (Emphasis added).

Nash II at 1537. (A-75). The Eleventh Circuit ignored the fact that the test questions were drafted according to the EEOC guidelines set forth in 29 C.F.R. Part 1607. (A-118-119). (See also A-126-128).

The Eleventh Circuit clearly substituted its findings on the weight of the evidence for the trial court's findings,[28] and failed to consider **Wards Cove** in the process as directed by the Supreme Court. By reweighing the evidence, the Eleventh Circuit went so far as to disregard its **Nash I** finding that the City exceeded its burden of production.

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28. "In any event, we believe that an analysis of the job-relatedness of the City's test conducted by the City itself was not legally sufficient to carry the City's burden [of persuasion]." (Emphasis added). **Nash II** at 1538 n.6. (A-78).

The Eleventh Circuit, therefore, violated this Court's directed verdict standard by undertaking a de novo review of the evidence.[29] **Nash III** should be reversed and the case remanded for entry of the trial court's judgment.

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29. In **Nash** II, the Eleventh Circuit made repeated references to the trial court being clearly erroneous. To the extent the "clearly erroneous" standard may be applicable, **Nash** II/III violated the principles of **Anderson v. Bessemer City**, 470 U.S. 564 (1985):

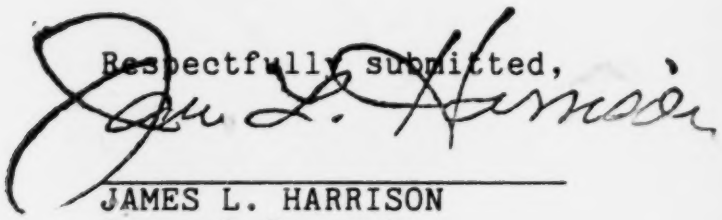
> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

Id. at 573.

CONCLUSION

For all the above reasons, petitioner prays that the United States Supreme Court grant this petition for a writ of certiorari in order to review and reverse the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in **Nash III**.

Respectfully submitted,



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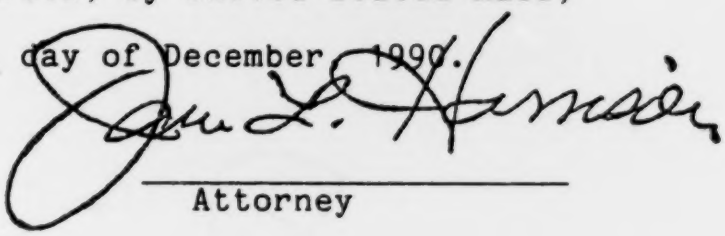
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this petition and the appendix to petition for writ of certiorari have been furnished to WINSTON NASH, Route 2, Box 686, Fort White, Florida 32038, Respondent herein, by United States mail, this 20th day of December, 1990.



Attorney